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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NEWPORT HARBOR OFFICES &  
MARINA, LLC,

Plaintiff and Appellant,

v.

HIGH SEAS YACHT CHARTERS, LLC,

Defendant and Respondent.

G054706 & G054877

(Super. Ct. No. 30-2015-00767315)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed. Motion to augment record granted.

Copenbarger & Associates, Paul D. Copenbarger and Elaine B. Alston for Plaintiff and Appellant.

Kushner Carlson, Michael B. Kushner, Jonathan D. Kent; Ecoff Campain & Tilles and Yaron M. Tilles for Defendant and Respondent.

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After leasing office space and boat slips to defendant and respondent High Seas Yacht Charters, LLC (defendant) and thereafter claiming defendant breached the lease agreements, plaintiff and appellant Newport Harbor Offices & Marina, LLC (plaintiff) filed unlawful detainer actions against defendant. When defendant vacated the leased premises, the unlawful detainer actions were consolidated and converted to general civil actions wherein plaintiff sought damages. The jury rejected plaintiff's damage claims and found in favor of defendant pursuant to a general verdict.

Plaintiff argues it was entitled to unpaid rent as a matter of law, and the court erred in denying its motion for judgment notwithstanding the verdict (JNOV). It also contends the court erred in excluding evidence, refusing special jury instructions, and finding both parties prevailed for purposes of awarding attorney fees. We agree the court erred in finding both parties prevailed but not as to the net amount of attorney fees awarded to defendant. There was no other error and we affirm the judgment.

We grant plaintiff's motion to augment the record to add a trial exhibit.

### **FACTS AND PROCEDURAL HISTORY**

Defendant rents paddleboards and electric Duffy boats and charters a large boat for touring Newport Harbor. In January 2013 plaintiff and defendant executed a five-year lease for office space at Newport Harbor (Office Lease). An amendment was executed extending the term of the Office Lease for approximately one more year.

The Office Lease provided defendant would use the office space for the agreed purpose and would not create a nuisance, damage, or waste or disturb neighboring tenants. It gave defendant a right to use common areas, subject to rules and regulations. Defendant also agreed not to do anything to invalidate its insurance policies. The common area rules prohibited obstruction of those areas, excess noise disturbing other tenants, littering, or installation of window coverings or vending machines.

When the Office Lease was executed, plaintiff also rented to defendant two contiguous boat slips, each pursuant to essentially identical five-year rental agreements.

The two slips were to be used by four Duffy boats (Duffys), which were described by the registration numbers, and by a 60-foot Chris Craft boat named Deo Juvante (Charter Boat). In May 2013, plaintiff rented a third slip to defendant under a month-to-month agreement to be used for paddleboards and kayaks.

Pursuant to the slip leases (Slip Leases) defendant agreed to comply with plaintiff's rules and any applicable governmental agency rules. The Slip Leases also provided only boats defendant had registered with plaintiff could be moored in the slips. Defendant also agreed to keep dock space in good order and not leave any personal property on the dock.

According to evidence at trial, in late 2014 defendant increased the number of Duffys in use leading to complaints from other tenants. Paul Copenbarger, a managing member of plaintiff and attorney of record in this action, testified he visited defendant's office and the slips and saw defendant was in default under several terms of the Office Lease and the Slip Leases. These included mooring approximately 20 Duffys in the two rented slips and in slips defendant had not rented.

Plaintiff served a three-day notice on defendant alleging various breaches of the Slip Leases and demanded defendant cure as follows: cease storing personal property on the docks; cease mooring the Charter Boat because its Coast Guard registration had expired; and cease mooring vessels not registered with the California Department of Motor Vehicles, not displaying current registration, registered in third party names, not submitted for plaintiff's inspection or which plaintiff had not approved, for which defendant did not have business license, or in addition to those listed in the Slip Leases.

In addition, plaintiff served a 30-day notice to quit for the third slip rented pursuant to the month-to-month rental agreement.

Plaintiff also served 3-, 10-, and 30-day notices to perform or quit as to alleged defaults under the Office Lease. Those notices demanded defendant cure by

ceasing to use the office space for illegal or improper activities including those described in the notice for the Slip Leases and also for sale of alcohol without a license and causing a nuisance by allowing customers to block common areas. Those notices also demanded defendant remove a number of allegedly improper items from the premises including vending machines, window coverings, signs in the common areas, and security cameras.

After the notices to perform or quit were served on defendant, defendant continued to tender full payment of rent. Plaintiff did not cash the rent checks to avoid reinstating the tenancies.

In January 2015 plaintiff filed an unlawful detainer action as to the two slips rented pursuant to the Slip Leases. In February 2015, plaintiff filed two unlawful detainer actions, one for the office and the other for the third slip. Plaintiff also filed three forcible detainer actions against defendant for its alleged use of three other boat slips plaintiff had never rented.

Before trial, alleged damages in the Slip Leases unlawful detainer action increased to more than \$25,000 and it was reclassified as an unlimited action and consolidated with the other actions for trial. Summary judgment in plaintiff's favor was granted as to the three forcible detainer actions.

Defendant vacated the two slips and the office space in September 2015 and the third slip in March 2015. Because possession was no longer in issue, the unlawful detainer actions were converted to civil actions and plaintiff filed amended complaints in each case, seeking damages.

Defendant alleged various affirmative defenses, including failure to mitigate, offset, and performance/excuse.

The consolidated cases were tried to a jury. Both parties had submitted special verdict forms, which the court refused. Instead the jury was given a general verdict form prepared by the court, asking, "Is [defendant] liable to [plaintiff]?" If yes,

“[w]hat are [plaintiff’s] damages?” The jury answered no to the first question, and judgment was entered in defendant’s favor.

Thereafter plaintiff filed a JNOV motion and a motion for new trial. The court denied both motions.

Each party then sought attorney fees, asserting it was the prevailing party. The court ruled that even though the actions had been consolidated for trial, it had to “analyze the unlawful detainer actions apart from the civil actions in allocating attorneys’ fees.” As to the unlawful detainer actions, the court found plaintiff was entitled to reasonable attorney fees in the sum of \$47,000. On the damages action, the court found defendant prevailed and awarded it \$232,000, for a net attorney fees award of \$182,000 to defendant.

## **DISCUSSION**

### *1. Standard of Review*

“Where no special findings are made, the reviewing court may infer that “the jury by its general verdict found for respondent on every issue submitted.” [Citation.] Specifically, the jury’s general verdict “imports findings in favor of the prevailing party on all material issues; and if the evidence supports implied findings on any set of issues which will sustain the verdict, it will be assumed that the jury so found. The court on appeal does not have to speculate on what particular ground the jury may have found in favor of the prevailing party.” [Citations.]’ [Citation.]” (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193 (*Wilson*).)

Where a defendant appeals from denial of a JNOV motion we review the record de novo to determine whether there was substantial evidence to support the verdict. (*Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 782.) However, where, as here, a plaintiff appeals from such a denial, and “the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically,

the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." (Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc. (2011) 196 Cal.App.4th 456, 466 (Sonic).)

## 2. Breach of Slip Leases and Office Lease

Plaintiff argues the court erred in denying the JNOV motion because defendant breached the Slip Leases and Office Lease. It sets out a laundry list of breaches, including many of those set out in the various notices to perform or quit, and argues their "number and severity" were sufficient to justify termination of the Office Lease and Slip Agreements.

But there was evidence defendant had not breached at all and many of the alleged breaches were so de minimis as to be immaterial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 82, 83 (*Boston*) [breach must be material to justify forfeiture of lease].) Therefore, plaintiff's evidence was neither uncontradicted nor unimpeached, nor was it such that we could determine it was insufficient. (*Sonic, supra*, 196 Cal.App.4th at p. 466.) Thus, we have no basis for overturning the jury's general verdict.

Conceding some breaches were "minor or technical," where reasonable minds may differ as to materiality, plaintiff argues certain of the breaches are so significant as to be material as a matter of law. Whether a breach is material is generally a question of fact. (*Boston, supra*, 245 Cal.App.4th at p. 87.) "[I]f reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law." (*Ibid.*)

Plaintiff asks us to determine certain breaches were material as a matter of law. We decline to do so. Plaintiff did not raise this argument in its opening brief and we need not consider arguments made for the first time in the reply brief. (*Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387-1388.)

### *3. Boat Slip Rent Damages*

Plaintiff contends the JNOV should have been granted because it is entitled to damages as a matter of law for unpaid rent under the Slip Leases. Based on stipulated facts as to the amount of monthly rental and the dates defendant vacated, plaintiff claims total damages of \$38,493 for the three slips. Plaintiff argues defendant did not prove any affirmative defenses or excuse for nonpayment.

In opposition, defendant claims any slip rents owed were offset against its damages due to plaintiff's wrongful termination of the tenancies, including rent for new space in excess of what it was paying to plaintiff and security deposits plaintiff did not refund. Defendant argued at trial it had not breached or the breaches were immaterial, and that plaintiff had breached the Office Lease and Slip Leases. Additionally, defendant argued plaintiff had manufactured breaches in order to terminate the tenancies.

Plaintiff argues these affirmative defenses cannot be the proper basis for the verdict because there were no jury instructions for offset or breach of the covenant of quiet enjoyment. We are not persuaded. The jury was instructed that for plaintiff to recover, it had to prove it substantially performed all of the "significant things" it was required to perform under the Office Lease and Slip Leases. The jury reasonably could have determined plaintiff failed to do so when it wrongfully deprived defendant of possession. In any event, as noted above, because the jury returned a general verdict, we need not speculate as to the ground on which it found in defendant's favor. (*Wilson, supra*, 169 Cal.App.4th at p. 1193.)

### *4. Exclusion of Evidence*

Plaintiff attempted to prove defendant was in breach because the Charter Boat had lost its required certificate of documentation. It put on evidence that to obtain such a certificate, an owner had to be a United States citizen. In the original application for the certificate Lucian Rusu, the principal of defendant, stated all members of defendant were citizens. At trial he testified everything in the original application for the

certificate was true. Plaintiff sought to introduce contrary deposition testimony, which the court denied.

Plaintiff contends it was prejudiced and the judgment must be reversed because the excluded evidence showed Rusu lied when he originally obtained the certificate for defendant or lied in his deposition. It argues this would prove defendant would not have been able to obtain a new certificate. We disagree.

Preliminarily, the record reference which plaintiff provided was incorrect. It does not direct us to the question or the court's ruling or set out the ruling in the brief. Based on a citation in defendant's brief and our own review of the record, it appears the court denied the request on the grounds it was "impeachment on a collateral matter, among other things." This ruling was well within the court's discretion.

“““[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.”” [Citation.] A trial court abuses its discretion ‘only if the trial court’s order exceeds the bounds of reason. [Citation.] “Where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the correct result for the decision of the trial court.” [Citation.] We will only interfere with the lower court’s judgment if appellant can show that under the evidence offered, “no judge could reasonably have made the order that he did.””” (Hart v. Keenan Properties, Inc. (2018) 29 Cal.App.5th 203, 207.)

Plaintiff's unsupported conclusion it was "clearly prejudiced" by the ruling does not suffice to show abuse of discretion.

##### *5. Jury Instructions*

Plaintiff challenges the court's rejection of five of its proposed special jury instructions. Two dealt with information regarding the requirements for a certificate of documentation, including a citizenship requirement (Nos. 19 & 23), two dealt with sale of alcoholic beverages (Nos. 7 & 22), and the last one had to do with material breaches of contract (No. 20). Plaintiff cannot prevail.



We review alleged instructional error de novo. (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1326.) A party is entitled to have the jury instructed on its theory of the case if the evidence could establish the necessary elements. (*Alcala v. Vazmar Corp.* (2008) 167 Cal.App.4th 747, 754.) When we review a claim of error based on failure to instruct, “we view the evidence in the light most favorable to the appellant” and “assume that the jury might have believed the evidence upon which” the instruction was based. (*Ibid.*) We do not reverse a judgment ““even for error involving “misdirection of the jury,” unless “after an examination of the entire cause, including the evidence,” it appears the error caused a “miscarriage of justice.””” (*Id.* at p. 755.)

Plaintiff has not met its burden of demonstrating the requisite prejudice because a general verdict form was used. We infer the jury found for defendant on each issue. (*Wilson, supra*, 169 Cal.App.4th at p. 1193.) Once more, we need not speculate as to any specific ground on which the jury found. (*Ibid.*) And we will not guess whether any asserted jury instruction error had any prejudicial effect on the verdict. Thus, plaintiff has not shown the alleged error resulted in a miscarriage of justice.

#### 6. Attorney Fees

Under Civil Code section 1717, in a contract action where the contract provides a prevailing party may recover attorney fees, the court must determine who the prevailing party is. The prevailing party is the party who recovered the greater relief. (Civ. Code, § 1717, subs. (a), (b)(1).)

“The trial court exercises wide discretion in determining who, if anyone, is the prevailing party for purposes of attorney fees.” (*Cussler v. Crusader Entertainment, LLC* (2012) 212 Cal.App.4th 356, 366; see *Hsu v. Abbata* (1995) 9 Cal.4th 863, 871 (*Hsu*).) We review the trial court’s ruling for manifest abuse of discretion, that is, whether the court acted in an “““““arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice””””” (*Cussler*, at p. 366), made a prejudicial

legal error, or made required findings not supported by substantial evidence (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1539).

“If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees. ‘[I]n deciding whether there is a “party prevailing on the contract,” the trial court is to compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements and similar sources.’” (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109, citing *Hsu, supra*, 9 Cal.4th at p. 877.)

Plaintiff contends the court erred in finding both parties prevailed. We agree. Neither party has cited nor have found any authority allowing the court to find both parties partially prevailed. And although the unlawful detainer actions were converted to ordinary civil actions after possession was no longer an issue, they were not separate actions for these purposes. Rather, they were the same actions.

Citing *de la Cuesta v. Benham* (2011) 193 Cal.App.4th 1287 (*de la Cuesta*), plaintiff argues it was the prevailing party because it recovered possession. Specifically, it relies on that portion of *de la Cuesta* where the court stated possession was “at least one of the landlord’s main litigation objectives.” (*Id.* at p. 1296.) But *de la Cuesta* does not aid plaintiff.

In *de la Cuseta*, after the defendant-tenant vacated possession on the eve of trial, the plaintiff recovered 70 percent of his requested damages and the defendant received nothing. The trial court, however, found there was no prevailing party. On appeal the court held this was an abuse of discretion in light of the plaintiff’s “lopsided” victory. (*de la Cuesta, supra*, 193 Cal.App.4th at pp. 1295, 1296.) Here plaintiff had no such lopsided victory. In fact, it had no victory on damages at all.

Plaintiff relies on the fact it obtained possession after defendant vacated. But this was not a typical unlawful detainer case where the tenant defaulted on paying rent and recovery of possession was one of the main litigation goals of a landlord. Here, nonpayment of rent was not the basis for the notices to perform or quit.

Plus, defendant's decision to surrender possession was arguably based on plaintiff's wrongful conduct or defendant's attempt to mitigate. And the general verdict shows the jury found either defendant had not breached or had defenses to the damages claims. In either event, defendant was the prevailing party, i.e., the party who achieved "a 'simple unqualified win.'" (*de la Cuesta, supra*, 193 Cal.App.4th at p. 1293.)

After determining who is the prevailing party a court must fix the amount of attorney fees. "““Trial judges are entrusted with this discretionary determination because they are in the best position to assess the value of the professional services rendered in their courts.””” (*McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 703.) We will not reverse a fee award unless it is “““clearly wrong.””” (*Id.* at p. 704.) “Indulging all inferences in favor of the trial court's order, as we are required to do, we presume the trial court's attorney fees award is correct.” (*Ibid.*)

After lengthy discussion about the amounts billed, the court exercised its discretion when it fixed the amount of attorney fees due defendant, and neither party challenged the amount. We may affirm if the ruling is correct on any grounds, regardless of the reasoning. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 993.) Consequently, we affirm the \$182,000 in attorney fee award to defendant.

**DISPOSITION**

The judgment is affirmed. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.